Nos. 78-575, 78-597, and 78-604

In the Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY, PETITIONER
v.
SEABOARD ALLIED MILLING CORP., ET AL.

INTERSTATE COMMERCE COMMISSION, PETITIONER
v.
SEABOARD ALLIED MILLING CORP., ET AL.

SEABOARD COAST LINE RAILROAD COMPANY, ET AL., PETITIONERS
v.
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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I

Both sets of respondents assert repeatedly that the tariffs at issue here are "plainly," "patently," "obviously," and "per se" unlawful "on their face" (*e.g.*, Bd. of Trade Br. 16, 17, 18, 19, 20, 26; Seaboard Allied Br. 13, 14, 15, 26, 27, 33, 45, 46, 47). Both argue that the Commission had a statutory "duty" to prevent the tariffs from taking effect (Br. of Trade Br. 14, n.15; Seaboard Allied Br. 16, 39). And they insist on characterizing the agency's action in this case as "permit[ting] * * * [the] tariffs to take effect" (Br. of Trade Br. 17), "authorizing the rates to

become legally effective" (Seaboard Allied Br. 45), and "clothing the tariffs with legality" (*id.* at 34). On the strength of those inflated premises, respondents conclude that the Commission's action is reviewable because the agency "overstep[ped] the bounds of its authority" (Bd. of Trade Br. 16; see Seaboard Allied Br. 15).

Respondents' argument is both impermissible and unpersuasive.

1. It is impermissible because, as respondents recognize, the logic of their argument carries them beyond their proper target. They admit that under their theory the Commission was required to reject or suspend the tariffs (Bd. of Trade Br. 17 n.15, 25; Seaboard Allied Br. 29). An investigation without suspension would not have delayed the rates' effectiveness. But the court of appeals remanded only for an investigation; it ordered neither rejection nor suspension (A. 315-316).

Although "[t]he prevailing party may * * * assert in a reviewing court any ground in support of his judgment," *Dandridge* v. *Williams*, 397 U.S. 471, 475, n.6 (1970), he may not, unless he has filed a cross-petition for certiorari, advance an argument that would modify rather than affirm the judgment below. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560, n.11 (1976); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381, n.4 (1970); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924). That principle applies here.

2. Respondents' arguments rest, in any event, on faulty premises. The Board of Trade says that the rates impermissibly discriminate between shipments carried in railroad-owned cars and those carried in privately-owned cars (Br. 9-15). In its view there is absolutely "no doubt" that for this reason the tariffs are "unlawful on their face" (Br. 19).

If that were so, of course, the Board of Trade and other aggrieved persons could easily enough file a complaint under Section 13 and obtain a prompt adjudication of the issue.[1] Contrary to respondents' exaggerated claims, however, the Commission has approved, and on occasion even prescribed, lower rates for shipments in private cars than for shipments in railroad-owned cars where the record has clearly justified that result.[2]

We cannot say, of course, whether the Commission would approve the rates in this case after a full hearing under Section 13. But we note that one of the principal purposes of the seasonal rate increase at issue here was to make better and more efficient use of railroad-owned freight cars—which are part of the national freight-car pool (see *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 743 (1972))—by reducing peak-period demand and boosting off-season car use (A. 35-36, 45, 89-92). See 49 U.S.C. 10727(a)(3). There is at least room to argue that the theory of the seasonal rate adjustment simply did not extend to shipments made in private cars.

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[1]It is not true, as the Board of Trade asserts (Br. 22), that "[t]he section 13(1) remedy is available only to shippers with large claims." Any aggrieved person may file a complaint, no matter how small the claim, and the Commission's Rules of Practice permit two or more persons to join in a single complaint if they have similar claims. 49 C.F.R. 1100.25(b). Moreover, it is settled, contrary to the Board of Trade's implication (Br. 22-23), that a shipper may recover damages if he can show that an unlawfully discriminatory or prejudicial rate resulted in lost sales and reduced profits. See *Interstate Commerce Commission* v. *United States*, 289 U.S. 385, 390-391 (1933); *ASG Industries, Inc.* v. *United States*, 548 F. 2d 147, 152-154 (6th Cir. 1977).

[2]See, *e.g.*, *Olympic Portland Cement Co.* v. *Director General*, 83 I.C.C. 402, 406 (1923), and *Lehigh Portland Cement Co.* v. *Director General*, 58 I.C.C. 429, 434 (1920), both of which collect cases. More recently, in *Grain by Rent-a-Train*, 339 I.C.C. 579 (1971), the Commission found lawful rates of $1 million per year for transportation in railroad-funished cars and $700,000 per year in shipper-furnished cars.

3. Seaboard Allied takes an entirely different approach. It says nothing about discrimination between railroad-owned and private cars. It tries, instead, to convert the Commission's order in this case from a discretionary no-investigation decision into a reviewable Section 4 relief order.[3] Thus, in Seaboard Allied's words, "the Commission's action was tantamount to excusing patent violations of the fourth section without findings and without observing statutorily prescribed procedures" (Br. 15).

The argument is bottomed on at least three fundamental misconceptions. First, contrary to Seaboard Allied's repeated assertions, the Commission's refusal to begin an investigation under Section 15(8) did *not* "cloth[e] the tariffs with legality" (Br. 34) or "excuse" any violations (Br. 13). A decision not to investigate, like a decision not to suspend, embodies no "final determination" that the challenged rates are lawful. *United States* v. *SCRAP*, 412 U.S. 669, 692, n.16 (1973). And, in contrast to an order granting Section 4 relief, a decision not to investigate is no defense to a subsequent Section 13 complaint alleging Section 4 violations. See 49 C.F.R. 1100.33(a).

Second, Seaboard Allied mistakenly suggests that the Commission cannot or will not entertain a Section 13 complaint for damages based on alleged Section 4 violations (Br. 14, 40-41). The statute imposes no such limitation. See 49 U.S.C. 11701(b). The Commission's own Rules of Practice contemplate Section 4 allegations in Section 13 complaints. 49 C.F.R. 1100.33(a). And both judicial and agency precedent show that Section 4 issues

[3]Section 4 prohibits charging more for a shorter haul than for a longer haul over the same route. 49 U.S.C. 10726(a)(1). In "special cases," however, the Commission may, after an investigation, relieve a carrier from the operation of that prohibition. 49 U.S.C. 10726(b), (d).

are in fact taken up in complaint proceedings and that damages for such violations are in fact awarded when injury is proven.[4]

Third, Seaboard Allied advances a strained argument that the Commission has a duty to enforce Section 4 before a rate takes effect (Br. 20-21) and that it may not "enforce the clause by post-effectiveness administration" (Br. 26). All that respondents are able to show, however, is that when a carrier wants to depart from Section 4 and applies for permission to do so, the rate filing will become effective one day after the permission is granted. See 49 U.S.C. 10726(d). Here, the carriers had no intention of departing from Section 4, did not want permission to do so, and stated their intention (A. 293) to eliminate any possibility that they would actually "charge or receive" more for a shorter haul than for a longer haul on the same route. 49 U.S.C. 10726(a).

[4]See, *e.g.*, *Davis* v. *Portland Seed Co.*, 264 U.S. 403, 424-425 (1924); *Sun Oil Co.* v. *Central R.R. of New Jersey*, 301 I.C.C. 558, 560 (1957); *Magnet Cove Barium Corp.* v. *Chicago, B. & Q. R.R.*, 301 I.C.C. 13, 18-19, 20 (1957); *Dant & Russell, Inc.* v. *Spokane, P. & S. Ry.*, 273 I.C.C. 284, 285-286 (1948); *Primrose Petroleum Co.* v. *Gulf, C. & S.F. Ry.*, 227 I.C.C. 261, 262 (1938); *Eastern Shore of Va. Produce Exchange, Inc.* v. *Pennsylvania R.R.*, 210 I.C.C. 615, 621 (1935); *Ozark Cider & Vinegar Co.* v. *Atchison, T. & S.F. Ry.*, 153 I.C.C. 477, 478 (1929).

Seaboard Allied relies on *Vinci* v. *Cleveland, C. & St. L. Ry.*, 147 I.C.C. 250 (1928), for the proposition that Section 13 complaint proceedings are not available for recovery of "overcharges" based on Section 4 violations (Br. 40-41 & n. 79). As the decision in that case explains, however, "overcharges" is a technical term that refers to charges in excess of the applicable tariff. That concept is alien to Section 4 cases, where the complaint is not that the carrier charged more than the tariff permitted but that the tariff rate itself is unlawful. What respondents neglect to mention is that the Commission in *Vinci* awarded "damages" to the Section 13 complainant, not on the basis of "overcharges," but on the basis of proven injury resulting from the Section 4 violations. The case thus stands for precisely the opposite of what respondents seem to imply.

Nothing in the Act or its legislative history imposes on the Commission a duty to reject, suspend, or investigate merely because a party asserts that Section 4 violations might occur.[5] The many instances of "post-effectiveness" complaints that raise Section 4 issues (see note 4, *supra*) demonstrate the error of respondents' argument.

II

The United States agrees with us that the court of appeals should not have reviewed the Commission's order. It reasons, however, that a decision not to investigate under Section 15(8) may be subject to judicial review at the conclusion of a subsequent Section 13 complaint proceeding.

1. The Solicitor General's argument rests on the notion that a decision not to investigate under Section 15(8) is "functionally equivalent" to assigning the burden of proof to the shipper instead of the carrier (Br. 7). But a Section 15(8) determination is not merely a preliminary stage in a Section 13(1) proceeding. Although a no-investigation decision may have "practical consequences" for any subsequent complaint proceeding, that alone does not make the former a part of the latter. *ITT* v. *Electrical Workers,* 419 U.S. 428, 445 (1975).

There is no requirement, for example, that a complaining shipper file a Section 13 complaint immediately after the Commission has decided not to investigate under

[5]While respondents say that the Commission "knew or should have known" (Br. 29) that the tariffs at issue were "permeated" with Section 4 violations (Br. 8), their own petition to reject the tariffs (A. 242-248), filed more than three weeks after the tariffs themselves were filed, identified only a single alleged violation, an allegation that respondents now admit "was in error" (Br. 8, n. 12). Their supplementary petition, filed only two days before the Commission was required to act, claimed "hundreds" of violations but offered only five more "illustrations" (A. 283). The railroads denied that any Section 4 violations would occur (A. 293). The Commission was not required to accept respondents' assertions.

Section 15. If the Section 13 proceeding begins years later, as it may, does the Solicitor General's theory leave open even then a review of the Commission's earlier decision not to investigate under Section 15(8)? And is the Commission free, under his theory, to decide in the midst of a Section 13 proceeding that the burden of proof should be reallocated to the carrier because the investigation should have been started under Section 15(8) (see U.S. Br. 17, n. 7)? Both the Commission and the parties would be surprised to learn that the burden of proof is subject to such alternation. See *Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 812-814 (1973).

2. The Solicitor General argues that the Section 13 complaint remedy—by which a person may force the Commission administratively to begin an investigation—shows that Congress did not intend to give the Commission unreviewable discretion in deciding whether to begin a Section 15(8) investigation (Br. 25-27). We agree that the administrative remedy is a significant factor in this case, but we think the edge of the sword faces in the opposite direction.

The fact that Congress gave aggrieved persons an administrative remedy for compelling an agency investigation is a good indication, in our view, that it did not contemplate a judicial remedy for that purpose. See our principal brief, pp. 23-27. That Congress empowered shippers to force a Section 13 investigation is no evidence that it meant to empower the courts to force a Section 15 investigation.

3. The Solicitor General argues that a court should be able to review a no-investigation decision if, for example, it rests on a mistaken view that the agency lacks jurisdiction (Br. 17, 34), on the fact that the shippers were members of the wrong political party (Br. 34), or on the ground that a proposal to triple rates for basic commodities would not have a sufficient impact to warrant expenditure of agency resources (*ibid.*).

We agree, as this Court has said, that "different considerations" apply when an agency "has refused or failed to exercise a statutory discretion * * *." *Schilling* v. *Rogers*, 363 U.S. 666, 676-677 (1960). And it may be that the Solicitor General's first two examples would fit that category.[6]

The third example, however, presumes a power to supervise the actual exercise of discretion. While judicial review is arguably available to ensure that the Commission in fact exercises its discretion, it does not follow that the courts may review "the *manner* in which discretion was exercised." *Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954).[7]

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[6]But see *Morris* v. *Gressette*, 432 U.S. 491, 507, n. 24 (1977), where the Court held unreviewable the Attorney General's failure to object to a voting law change and declined to find an exception for situations in which "the Attorney General improperly relinquishes his responsibility to evaluate independently the submitted legislation in light of the [relevant] standards * * *." The Court also rejected an argument that judicial review was required to protect against possible political abuse. "In determining whether preclusion of judicial review can fairly be inferred from the context of the entire legislative scheme, we place no weight on the prospect that an Attorney General someday will trade electoral votes for preclearance under §5." *Id.* at 506, n. 23.

[7]The Solicitor General seems to assume that Commission decisions not to investigate are accompanied by findings and conclusions. That is rarely the case. See our principal brief, p. 63. Although the Act provides that the Commission must furnish a statement of reasons if it decides to suspend a proposed rate filed by a non-rail carrier, 49 U.S.C. 10708(b), it does not require any statement of reasons for a decision not to investigate or suspend a rail or non-rail rate. The Administrative Procedure Act requires a statement of the grounds for denying a petition "made in connection with any agency proceeding." 5 U.S.C. 555(e). A Section 15(8) decision is not an "agency proceeding" because it neither results in nor leads to a "rule" or "order" within the meaning of the APA's definitions. 5 U.S.C. 551 (4), (5), (6), (7), (12). See *ITT* v. *Electrical Workers*, 419 U.S. 428, 441-448 (1975). See also *Beltone Electronics Corp.* v. *Federal Trade Commission*, 402 F. Supp. 590, 596-597 (N.D. Ill. 1975).

For the reasons stated above and in our main brief, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the petitions for review.

Respectfully submitted.

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